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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE W. AKOOTCHOOK, et al.,

*Petitioners,*

VS.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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*February 21, 1985*

## QUESTIONS PRESENTED

The Ninth Circuit Court of Appeals ruled that an Alaskan Native is not eligible for an allotment to land located within a national wildlife refuge unless the applicant can prove his personal use and occupancy commenced prior to an Executive withdrawal of the land. The questions presented are:

1. Whether the Pickett Act authorized the President to withdraw land used and occupied by Alaskan Natives.

2. Whether land to which Alaskan Natives held aboriginal title was "vacant, unappropriated and unreserved" within the meaning of 43 U.S.C. § 270-1 (repealed 1971).

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The petitioners, George W. Akootchook, Evelyn Gordon, Peter Panruk and Stanley McCormick, for themselves and on behalf of a certified class [1] of over 150 Native allotment applicants, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 23, 1984.

## OPINIONS BELOW

The opinion of the court of appeals, reported at 747 F.2d 1316, appears in the Appendix hereto at App. 2a-16a. The unreported Memorandum and Order of the District Court for the District of Alaska appears at App. 17a-24a. The administrative decisions, reported at 17 IBLA 189 (Sept. 16, 1974), 23 IBLA 304 (Jan. 16, 1976), and 43 IBLA 69 (Sept. 19, 1979), appear at App. 26a-39a.

## JURISDICTION

The judgment of the court of appeals was entered on November 23, 1984. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1 of the Alaska Native Allotment Act, 34 Stat. 197 (1906) as amended by the Act of August 2, 1956, 70 Stat. 954 (formerly codified at 43 U.S.C. § 270-1 (1970) ), repealed but with a savings clause for pending applications, 43 U.S.C. § 1617 (1982). The entire text of the Alaska Native Allotment Act, as amended, appears at App. 40a-41a.

Act of June 25, 1910 (Pickett Act), 36 Stat. 847 (repealed 1976). The text of the Pickett Act appears at App. 42a-43a.

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[1] The class is defined at App. 4a.

## STATEMENT OF THE CASE

The Alaska Native Allotment Act provides that land is available for allotment only if it is "vacant, unappropriated, and unreserved." 43 U.S.C. § 270-1 (repealed 1971). Petitioners are Alaskan Natives who seek an allotment to land used and occupied by their families for generations. App. 3a. The Executive withdrew each petitioner's allotment for inclusion within a national wildlife refuge before the petitioner commenced personal use and occupancy of the land. The Department of the Interior denied the allotment applications, determining that the land applied for was not "vacant, unappropriated and unreserved." App. 3a.

Use of lands sought by the petitioners and other class members follows a similar pattern. In each instance, use of the land was initiated by an ancestor or other Native predecessor of the class member. The land was used for hunting, trapping, fishing, gathering berries, or for other subsistence activities. After the death of the original occupant, the use was continued, without interruption, by that occupant's descendants until the class member began his or her own independent use. At a time subsequent to the initial occupancy, but prior to the applicant's personal use, an Executive Order was issued withdrawing land now sought by the applicant.

For example, [2] Stanley McCormick was born in Larsen Bay, Alaska, on December 12, 1953. CR 11, ex. 9. [3] Larsen Bay is located on the western coast of Kodiak Island. The land for which Mr. McCormick applied is located about one and a half miles from the village of Larsen Bay, and within the exterior boundaries of the Kodiak National Wildlife Refuge ("Kodiak Refuge"). It is a wooded area and has a fresh water creek which runs in the summer.

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[2] The lower court described the use of land sought by another petitioner, Peter Panruk, and the land's interaction with the Yukon Delta National Wildlife Refuge. App. 11a-15a.

[3] "CR" references the portion of the clerk's record on file with the Ninth Circuit where the factual support for a particular statement may be found. The affidavit from which this narrative is drawn can be found at CR 11, ex. 9.

Prior to Stanley's birth, his father made use of this land. He picked berries, dug for clams and hunted on the land until he died in 1970. Stanley McCormick's use of the land began in 1957 at the age of four. He and his parents engaged in subsistence activities on the land several times each week. In the summer and fall, they would pick berries and dig for clams. When he was six or seven, Stanley hunted rabbits and ducks in the fall and winter with his father. At the age of ten he began to hunt there by himself.

On May 9, 1958, Public Land Order 1634 withdrew for inclusion within the Kodiak Refuge the land being used by young Stanley McCormick and his parents. CR 11, ex. 26. The withdrawn land has remained closed to further appropriation.

Since approximately 1963, when he was ten years old, Mr. McCormick has used his land almost every year for berry picking, gathering wood, clam digging and hunting. About half of his food is derived from subsistence activities on his land. Almost all of the wood for his stove comes from the land. It is a place where he intends to build a home.

On March 31, 1972, the Bureau of Indian Affairs filed a Native allotment application on behalf of Stanley McCormick. The Bureau of Land Management rejected the application on May 30, 1975. On appeal, the Interior Board of Land Appeals found that Mr. McCormick failed to establish entitlement to his allotment prior to the withdrawal. *Stanley P. McCormick*, 23 IBLA 304 (Jan. 16, 1976). App. 33a. The applications of other class members received similar treatment.

This action was filed on January 15, 1982. Jurisdiction was conferred by 28 U.S.C. § 1353 (1982). The district court granted summary judgment for the government, holding that the land sought by class members was validly withdrawn and unavailable for allotment under the Alaska Native Allotment Act. App. 24a.

On appeal, the Court of Appeals for the Ninth Circuit affirmed. App. 1a. It held that the Pickett Act authorized the Executive to withdraw land occupied by Alaskan Natives for inclusion within a national wildlife refuge, App. 6a, and that the withdrawals terminated the aboriginal possessory rights of Alaskan Natives. App. 7a. Noting that the Alaskan

Natives had been victimized by unfortunate technical traps in their efforts to obtain title to land they and their ancestors have used for generations, the court recommended that the fairness of the administrative withdrawals be reviewed by Congress. App. 9a. (Ferguson, Circuit Judge, concurring).

## REASONS FOR ISSUING THE WRIT

### I. THE LOWER COURT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The court of appeals' decision directly conflicts with previous decisions of this Court. The lower court found that the Secretary of the Interior could terminate Native use and occupancy rights by withdrawing lands under the Pickett Act. Act of June 25, 1910, 36 Stat. 847 (repealed 1976). That Act authorized the President to temporarily withdraw "public lands" from settlement, location, sale, or entry. Relying upon *Larkin v. Paugh*, 276 U.S. 431, 438 (1928), the lower court reasoned that lands occupied by Alaskan Natives were "public lands" within the meaning of the Pickett Act. From this premise, the court reached several conclusions. It concluded that the Pickett Act authorized the Secretary to withdraw lands occupied by Alaskan Natives. It concluded that such withdrawals extinguished Native use and occupancy rights. And, finally, it concluded that land so withdrawn was not "vacant, unappropriated, and unreserved" for purposes of the Alaska Native Allotment Act.

These conclusions contravene two distinct, albeit related, lines of authority. First are decisions defining the term "public lands" as used in federal land law. Second are opinions articulating the scope and nature of Native use and occupancy rights — rights sometimes referred to as Indian title or aboriginal title.

#### A. The Lower Court's Opinion Contravenes Controlling Decisions Defining "Public Lands"

The Pickett Act authorized the President or his designee to withdraw "public lands" from the public domain. This Court has long held that "public lands" are words of art which, when used in statutes dealing with

federal land, mean land which can be sold or otherwise disposed of pursuant to general land law. Since the Secretary of the Interior could not sell or otherwise dispose of land encumbered by Native use and occupancy claims, these decisions, together with the pertinent legislative history of the Pickett Act, establish that the Act did not empower the Executive branch to withdraw those lands used and occupied by Alaskan Natives. As a result, these lands — as "vacant, unappropriated, and unreserved" parcels — remained open for allotment applicants.

As a preliminary matter, the parties agree that the Pickett Act authorized only the withdrawal of "public lands." The Act was quite express in this regard, authorizing the President to "[w]ithdraw from settlement, location, sale, or entry *any of the public lands* of the United States, including the District of Alaska. . . ." (emphasis supplied).

Previous decisions by this Court as well as the legislative history of the Pickett Act demonstrate that the term "public lands" only encompassed land which could be sold or disposed of under general land law. In previous decisions, this Court has consistently defined "public lands" as land that is subject to sale or disposal under general land law. *Newhall* v. *Sanger*, 92 U.S. 761, 763 (1875); *Borden* v. *Northern Pacific Railroad*, 145 U.S. 535, 538 (1892); *Northern Lumber Co.* v. *O'Brien*, 204 U.S. 180, 196 (1907); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 391 (1902); *Wyoming* v. *United States*, 255 U.S. 489 (1921); *Payne* v. *Central Pacific Railway*, 225 U.S. 228 (1921). The *Borden* decision is illustrative. There, the Court stated that:

> By "public land" as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, *to which any claims or rights of others have attached, does not fall within the designation of public land.*

145 U.S. at 538 (emphasis supplied).

The legislative history of the Pickett Act is equally determinative. Although the Act does not define "public lands," its legislative history resolves all doubt as to Congress' intent. Brief but to the point, the

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Senate Report accompanying the Act provides: "The phrase 'public lands,' found in our various land laws, is used in our legislation to describe such lands as are subject to sale or other disposition under general law. . . (citing *Newhall v. Sanger*)." S. Rep. No. 171, 61st Cong., 2d Sess. 3.

Per this definition, lands used and occupied by Alaskan Natives were not "public lands" because they could not be sold or disposed of under general land law. As this Court has previously held, Alaskan Natives held aboriginal title to lands they traditionally used and occupied. According to the Indian Non-intercourse Act, 25 U.S.C. § 177, as well as governing principles firmly established by other decisions rendered by this Court, the Executive branch could not sell or otherwise dispose of lands so encumbered under general land laws without the consent of Congress.

The definitive authority for the proposition that Alaskan Natives held aboriginal title before Congress passed the Alaska Native Claims Settlement Act is *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). Although usually cited for the proposition that the Fifth Amendment does not require compensation for the taking of aboriginal title, the case also holds that Alaskan Natives held aboriginal title to lands they had traditionally used and occupied. *Id.*

The authority for the proposition that the Executive cannot dispose of lands encumbered by aboriginal title is equally persuasive. In a string of unbroken decisions, the Court has held that the Executive branch cannot sell or dispose of lands encumbered by aboriginal title without securing the consent of Congress. *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941); *Cramer v. United States*, 261 U.S. 219 (1922). The *Santa Fe* case is directly on point. In sweeping language which admits of no exception, that case holds that Congress has the exclusive authority to extinguish Indian title, and that any attempt by the Executive branch to destroy such title by conveyances pursuant to general land law can have no legal effect. 314 U.S. at 347.

The Department of the Interior has traditionally followed these decisions and respected the aboriginal title of Alaskan Natives, consistently finding that lands encumbered by aboriginal title could not be sold or

otherwise conveyed. As early as 1935, the Department officially declared that "lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others." *Allotments of Public Lands in Alaska to Indians and Eskimos*, 55 Interior Dec. 282, 287 (1935). *See also Aboriginal Fishing Rights in Alaska*, 57 Interior Dec. 461 (1942). The Department has formalized this position by regulation. *See* 43 C.F.R. § 2091.6-3 (1983). In 1966, it implemented this policy by declaring a "freeze" on conveyances of land encumbered by aboriginal possessory rights. *See Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969). It offers no reason why its position should now change.

These authorities demonstrate that the Pickett Act did not empower the Executive to withdraw land encumbered by aboriginal claims. The Pickett Act empowered the Executive branch to withdraw "public lands." The controlling decisions of this Court, as well as the legislative history of the Pickett Act, confirm that the term "public lands" only encompassed lands which could be sold under general land law. Land used and occupied by Alaskan Natives was held by aboriginal title. It could not be sold under general land law, and accordingly could not be withdrawn under the authority of the Pickett Act. [4]

## B. In No Event Could Pickett Act Withdrawals Terminate Aboriginal Use and Occupancy Rights

Assuming the Pickett Act empowered the Executive to withdraw lands held under aboriginal title — a somewhat doubtful proposition — previous decisions by this Court would prevent such withdrawals from defeating claims asserted under the Alaska Allotment Act. The Allotment Act was intended to permit individual Alaskan Natives to perfect record title to a portion of lands held under aboriginal title. To

[4] In a footnote, the court of appeals also stated that section 305 of the Alaska National Interest Lands Conservation Act ("ANILCA"), 94 Stat. 2395 (1980), ratified the withdrawals even if they were not authorized under the Pickett Act. App. 6a. The statement is puzzling. Executive actions in effect at the time of the enactment of ANILCA were confirmed by section 305 unless inconsistent with that Act or the Alaska Native Claims Settlement Act ("ANCSA"). However, the petitioners' applications for allotments were filed before the repeal of the Allotment Act by ANCSA in 1971, and a determination on entitlement to an allotment depends on events occurring long prior to the enactment of ANILCA. Moreover, as such pending applications were saved by section 18(a) of ANCSA, section 305 could not defeat the claims.

effectuate this purpose, the Allotment Act opened to allotment applicants any and all lands held under aboriginal title, providing that lands so encumbered were "vacant, unappropriated, and unreserved." Since allotment applicants could apply for any lands held under aboriginal title, allotment claims could only be categorically defeated by an act terminating these underlying possessory rights.

Contrary to the lower court's opinion, land withdrawals effectuated pursuant to the Pickett Act could not serve as that termination. Two hundred years of decisions by this Court hold that Native use and occupancy rights can only be extinguished by an unambiguous and express act of Congress. When applied to this case, those decisions demonstrate that the Pickett Act, as a general statute which does not mention let alone address aboriginal title, could not authorize the Executive to terminate the aboriginal possessory rights of Alaskan Natives. Unaffected by land withdrawals effectuated pursuant to the Pickett Act, those aboriginal rights would remain, ensuring that the land stayed "vacant, unappropriated, and unreserved" for purposes of the Allotment Act.

Congress crafted the Alaska Allotment Act for the purpose of allowing individual Alaskan Natives to perfect record title to a portion of lands held communally under aboriginal title. With support from two different philosophical camps, the Act was intended to transform aboriginal title into record title. In its worst light, the Act was passed to destroy Native society and culture by replacing traditional patterns of communal use with one based on individual ownership rights. D. Case, Alaska Natives and American Laws 135 (1984). In its best light, the Act was designed to protect Alaskan Natives from over-reaching and rapacious settlers by providing the Natives with something more legally substantial than aboriginal possessory rights. This philanthropic motivation is described by the leading Alaskan Indian law commentator as follows:

> It was obvious to Congress that unless the Natives had legal title, miners, settlers, and other non-Natives could trespass, even appropriate, Native lands with impunity by purporting to perfect indepen-

> dent title under other federal laws. Given their ignorance of legal procedures and the distance of most Native lands from a court, it was predictable that Natives could not retain landholdings through the slender thread of protection offered by aboriginal possessory rights.

*Id.* at 136.

Whatever its motives, Congress contemplated that the Act would apply to all lands to which Alaskan Natives held aboriginal possessory rights. This conclusion follows from the purposes of the Act. Only by permitting individual Alaskan Natives to apply for allotments on lands held under aboriginal title could the Native traditional communal use and occupancy system be destroyed. And only by permitting allotments on lands held under aboriginal title could the Natives' legal title to those lands be strengthened.

The geographical scope of the Allotment Act was thus roughly congruent with the breadth of aboriginal land holdings. Lands to which Natives held aboriginal title were open to allotment applicants; lands open to allotment applicants were held under aboriginal title. Legally, the relationship between the Allotment Act and aboriginal title was expressed in the notion that lands to which Alaskan Natives held aboriginal title were "vacant, unappropriated, and unreserved" for purposes of the Allotment Act.

Given the close relationship and geographic congruency between the Allotment Act and the aboriginal land holdings of Alaskan Natives, the right to acquire record title pursuant to the Allotment Act could only be destroyed or compromised by terminating the underlying right to use and occupy the land. Congress understood and implemented this principle when it terminated the aboriginal title of Alaskan Natives by passing the Alaska Native Claims Settlement Act in 1971. 16 U.S.C. §§ 1601 *et seq.*. Recognizing that the Allotment Act was intended to permit Native Alaskans to perfect record title to lands held communally under aboriginal title, and that the Allotment Act was dependent upon

as well as connected to the underlying aboriginal claims, the Settlement Act repealed the Allotment Act as part of the termination of aboriginal title claims. Act of Dec. 18, 1971, Pub. L. No. 92-203, § 18, 85 Stat. 710, *codified at* 43 U.S.C. § 1617 (a). *See also* § 1617 (b) (charging allotment lands against acreage otherwise made available to Alaskan Natives under the Settlement Act).

The lower court apparently found an earlier extinguishment. Without discussing or citing any authority, the court held that Executive land withdrawals under the Pickett Act terminated the aboriginal title of Alaskan Natives. It further held that the termination of aboriginal rights destroyed the rights of individual Alaskan Natives to acquire record title to the lands so withdrawn. App. 9a.

These two holdings contravene almost two centuries of Indian law. Never deviating from its decisions in *Johnson v. McIntosh* and *Jones v. Meehan*, this Court has consistently held that only Congress can terminate aboriginal rights, and that the termination must be direct, unambiguous, and supported by highly convincing evidence. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968); *Cramer v. United States*, 261 U.S. 219 (1922); *Jones v. Meehan*, 175 U.S. 1 (1899); *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 486-93 (3d Ed. 1983).

The Pickett Act hardly constitutes the direct and unambiguous termination required by these authorities. Passed in order to resolve a controversy over the Executive's authority to withdraw land pursuant to congressional acquiescence, *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), the Pickett Act speaks in sweeping terms, broadly delineating the withdrawal powers of the Executive branch. It does not so much as mention aboriginal title or Alaskan Natives. *See generally* Act of June 25, 1910, 36 Stat. 847 (repealed 1976).

From this perspective, the lower court's decision conflicts with this Court's opinions in *Cramer*, *Santa Fe*, and *Tee-Hit-Ton*. Those cases demonstrate that the Pickett Act cannot be read as terminating the

aboriginal rights of Alaskan Natives. The aboriginal claims survived all land withdrawals made pursuant to the authority of that Act, remaining as encumbrances on any lands otherwise withdrawn from the public domain. Consistent with the purpose of the Alaska Allotment Act — to permit individual Alaskan Natives to acquire record title to lands held under aboriginal title — these encumbrances segregated the land for the benefit of individual Alaskan Natives, rendering these lands "vacant, unappropriated, and unreserved" for purposes of the Allotment Act.

## II. THIS CASE RAISES CRITICAL FEDERAL QUESTIONS INVOLVING HUNDREDS OF ALASKAN NATIVES

The lower court ruled that the Executive withdrawals rendered the land unavailable for allotment because withdrawn land was not "vacant, unappropriated and unreserved," notwithstanding the fact that it was being used and occupied by Alaskan Natives. This ruling will directly deprive a class of approximately 150 Alaskan Natives, plus several hundred members of their immediate families, of the opportunity to acquire a trust patent to the land which they and their ancestors have used and occupied for generations.

In addition, the government contends that this case will inevitably prevent hundreds of Alaskan Natives from receiving allotments in other federal withdrawals, including additional national wildlife refuges, national monuments, military reserves, and numerous administrative reserves of various federal agencies throughout Alaska. CR 16 at 2, 3. Furthermore, the government argues that the lower court's decision is authority for the position that even a minor child who personally used land in the company of her parents at the time the land is withdrawn is not entitled to an allotment. *United States v. Lindgren*, BLM No. AA-8228, Government Contest Hearing (Dec. 4, 1984), Transcript at 13. This would mean the numerous applicants who were minors at the time a withdrawal affected their land would be added to the increasing number of applicants who will be denied their birthright — the land that has been used by their families since time immemorial. Review by this Court will therefore have a legal impact far beyond the confines of this particular case and will certainly affect the outcome of a broad range of Native allotment cases in Alaska.

Traditionally this Court has taken a strong interest in Indian allotment issues, finding them to be worthy of review even when they focus on narrow interpretive issues of a statute. *See, e.g., Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *United States v. Jackson*, 280 U.S. 183 (1930); *United States v. Payne*, 264 U.S. 446 (1924); *LaRoque v. United States*, 239 U.S. 62 (1915). This interest is well deserved, for a claim to land historically used by Indian people is an issue of great importance. Such land is both a link to the past and the cornerstone of the future of a people. It is inextricably bound up in their culture and their way of life.

These considerations are present here. The land sought by the petitioners has been used by their parents, grandparents and other forebears to hunt, fish, trap, gather berries and engage in additional subsistence activities. Such activities are necessary not only to provide food for their families, but to maintain the subsistence life-style which Alaskan Natives have practiced for countless generations. Without land, the applicants will be unable to participate in the life-style necessary for their well-being.

In this regard, subsistence activities continue to play an important role in the life of Alaskan Natives. There is a common perception that the needs of Alaskan Natives were met by ANCSA. A draft ANCSA report to Congress, required by section 23 of ANCSA, contradicts this viewpoint. U.S. Department of the Interior, ANCSA 1985 Study (June 29, 1984 Draft). The most recent census in 1980 found that the percentage of Natives living below the official poverty level was three times higher than that of non-Native Alaskans. *Id.* at IV-18. The highest proportion of Natives living below the poverty level in 1980 (37 percent) was in southwest Alaska, the home of class members seeking land within the Yukon Delta National Wildlife Refuge. *Id.* The report to Congress indicates that subsistence continues to provide a large proportion of food requirements for many Alaskan Natives. Indeed, 35 percent of Alaskan Natives obtain at least half their food from subsistence activities. *Id.* Accordingly, the allotments at issue are

necessary not only for continuation of the subsistence life-style but are of vital economic importance to each petitioner and his or her family. [3]

Although disagreeing with the petitioners' legal arguments, the lower court questioned the fairness of the Executive withdrawals which deprived the petitioners of an opportunity to receive title to their land. App. 9a. The majority opinion made the unusual suggestion that Congress review the situation. The concurring opinion referred to the withdrawals as "unfortunate technical traps," victimizing the Alaskan Natives and depriving them of the chance to receive title to their land. App. 10a. However, the lower court incorrectly assumed that a proper interpretation of the Allotment Act thwarted any hope class members had to obtain their land. As previous decisions of this Court demonstrate, this is erroneous. A proper interpretation of the Allotment Act is of vital importance to hundreds of Alaskan Natives.

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[3]Conveyances of land under section 14(c)(1) of ANCSA, 43 U.S.C. § 1613(c)(1) (1982), would not satisfy the needs of the petitioners. Most section 14(c)(1) conveyances have been limited to minimal acreage. An allotment, however, can contain several subsistence use areas, not to exceed a total of 160 acres. 43 C.F.R. § 2561.0-8(a) (1983). Furthermore, a certificate of allotment, unlike a section 14(c)(1) conveyance, grants restricted title.

## CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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February 21, 1985

# APPENDIX

JUDGMENT

# United States Court of Appeals
## FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| George W. Akootchook, Evelyn Gordon, Peter Panruk, and Stanley McCormick, | ) | |
| Plaintiffs-Appellants, | ) | |
| -vs- | ) | |
| | ) | No. 83-4181 |
| United States of America, Department of the Interior, William Clark, Secretary, | ) | DC No. CV 82-4 JAV |
| Defendants-Appellees. | ) | (Filed and entered November 23, 1984) |

APPEAL from the United States District Court for the Fairbanks District of Alaska.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Fairbanks District of Alaska and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

cy: U.S Attorney
Craig Tillery
Judge von der Heydt

# United States Court of Appeals
## FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| George W. Akootchook, Evelyn Gordon, Peter Panruk, and Stanley McCormick, | ) | CA No. 83-4181 |
| | ) | DC No. CV 82-4 |
| Plaintiffs-Appellants, | ) | |
| v. | ) | OPINION |
| United States of America, Department of the Interior, William Clark,* Secretary, | ) | Filed and entered November 23, 1984 |
| Defendants-Appellees. | ) | |

Appeal from the United States District Court
for the District of Alaska
Hon. James A. von der Heydt, District Judge, Presiding

Argued and Submitted — August 22, 1984

Before: CHAMBERS, FERGUSON and BEEZER, Circuit Judges

BEEZER, Circuit Judge:

This appeal concerns the right of Alaska Natives to apply for allotments of land located inside three national wildlife refuges. When the Department of the Interior refused to consider the applications of four Alaska Natives, they filed suit to compel the Department to consider their applications. The district court granted a summary judgment against the applicants, from which they appeal. We affirm.

*William Clark has been substituted for James Watt pursuant to Fed. R. App. P. 43(c)(1).

# I

## FACTS AND PROCEEDINGS BELOW

Although Native Americans have the right to use and occupy large areas of land, they have no general right to obtain an ownership interest in the land. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279-82 (1955). In 1906, however, Congress passed the Alaska Native Allotment Act ("the Allotment Act"), ch. 2469, 34 Stat. 197 (1906) (codified as amended at 43 U.S.C. § § 270-1 to -3 (1970)), which gave Native Alaskans the right to apply for allotments of "vacant, unapportioned, and unreserved nonmineral land in Alaska." 43 U.S.C. § 270-1 (1970). Although the Allotment Act was repealed in 1971 by the Alaska Native Claims Settlement Act ("ANSCA"), 43 U.S.C. § 1617, ANSCA contained a savings clause for applications pending on the date of the repeal of the Allotment Act. *Id.* § 1617(a). *See generally* F. Cohen, *Handbook of Federal Indian Law*, 741-50 (1982).

This appeal focuses on lands inside three Alaskan wildlife refuges. Beginning in 1919, these lands were withdrawn by the federal government in a series of Executive Orders. The Alaska National Interest Lands Conservative Act ("ANILCA") consolidated the various withdrawals into three wildlife refuges: the Arctic National Wildlife Refuge, the Kodiak National Wildlife Refuge, and the Yukon Delta National Wildlife Refuge. Pub. L. No. 96-487, § 303(2), (5), (7), 94 Stat. 2390-93 (1980).

The plaintiffs in this case are Native Alaskans whose families have used and occupied the lands in question for generations. The Department of the Interior, however, refused to consider their applications for allotments in the various refuges because each applicant's personal use and occupancy had commenced after the land had ceased to be "vacant, unappropriated, and unreserved." Subsequently, the plaintiffs brought

this suit in district court to compel the Department to consider their applications.[1] Both sides filed motions for summary judgment. On August 5, 1983, the district court denied the plaintiffs' motion and granted the Government's motion "to the effect that the lands at issue were validly withdrawn as wildlife refuges, and were not available for allotment by individuals whose individual use and occupancy . . . began after an effective withdrawal."

## II

## ANALYSIS

### A. *Ancestral Usage*

The plaintiffs contend that they are entitled to apply for allotments based on their ancestor's use and occupancy of the land prior to the creation of the wildlife refuges. In support of this contention, the plaintiffs note that section 2 of the Allotment Act, which authorizes allotments in national forests, requires the application to be "founded on occupancy of the land prior to the establishment of the particular forest." 43 U.S.C. § 270-2 (1970). In *Shields v. United States*, 698 F.2d 987 (9th Cir.), *cert. denied*, 104 S. Ct. 73 (1983), we interpreted that provision to require prior personal occupancy by the applicant and rejected the argument that ancestral usage satisfied the statute. In this case, however, the plaintiffs claim a right to apply for allotments under section 1, rather than section 2. They argue that Congress' failure to place language regarding prior occupancy in section 1 shows that Congress only intended to require prior personal occupancy for claims under section 2.

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[1]The district court certified a class of plaintiffs consisting of:

All Alaska Natives who made timely application for allotments under the Alaska Native Allotment Act . . . for lands located within the boundaries of those National Wildlife Refuges, now known as the Arctic National Wildlife Refuge, the Yukon Delta National Wildlife Refuge and the Kodiak National Wildlife Refuse[sic] and whose applications have been or will be denied because the land they sought was considered reserved or otherwise unavailable for allotment for reasons related to or arising out of its status as withdrawn land.

In light of the legislative history of section 2, however, we reject the plaintiffs' argument. Section 2 was added in 1956 as part of a comprehensive amendment of the Allotment Act. Act of Aug. 2, 1956, ch. 891, 70 Stat. 954. The 1956 amendments permitted Native Alaskans to alienate their allotments. Section 2 was added as a response to concerns that Native Alaskans would abuse this right by obtaining allotments in national forests for the sole purpose of selling them. *See Shields*, 698 F.2d at 989. At the same time, the "vacant, unappropriated, and unreserved" requirement was added to section 1. Assistant Secretary of the Interior Wesley A. D'Ewart, who proposed the amendment, explained it as follows:

> Subsection (b) of the enclosed substitute bill makes it clear that homesteads may be selected under section 1 of the 1906 act only from vacant, unappropriated, and unreserved land. That has been the consistent administrative interpretation of the act. Unless that fact is specified, however, the provision in section 2 of the bill permitting Indian homesteads to be selected in national forests under certain circumstances might be made the basis for an inference that other reserved lands are also available for homesteading.

S. Rep. No. 2696, 84th Cong., 2d Sess., *reprinted in* 1956 U.S. Code Cong. & Ad. News 4204. We conclude that the plaintiffs' construction of the statute is incorrect.

The plaintiffs also argue that the right to seek allotments was inheritable. While we have held that use and occupancy rights are transferable, *e.g.*, *Arness v. Petersburg Packing Co.*, 260 F. 710, 712 (9th Cir. 1919), we know of no authority for the proposition that the right to seek an allotment is transferable. In light of the legislative history discussed above, we reject that proposition.

B. *The Validity of the Withdrawals*

All of the wildlife refuges at issue in this case were created by Executive Orders. The plaintiffs contend that the Executive lacked authority to disturb their right to seek allotments by creating wildlife refuges. We disagree. The Pickett Act, ch. 421, 36 Stat. 847 (1910) (repealed 1976), authorized the President to reserve public lands for public purposes. The lands in question were "public lands" within the meaning of the Pickett Act. *See Larkin v. Paugh*, 276 U.S 431, 438 (1928). While the plaintiffs argue that the "settlement" exception to the Pickett Act applies in this case, that exception requires the "settler" to maintain and perfect the settlement pursuant to law. Ch. 421 § 2, 36 Stat. 848 (1910). Because the plaintiffs did not "perfect" their claim by seeking an allotment, we find that the settlement exception is inapplicable. But even if the Pickett Act did not authorize the creation of these wildlife refuges, we would uphold the withdrawals because Congress ratified the Executive Orders in section 305 of ANILCA, Pub. L. No. 96-487, § 305, 94 Stat. 2395 (1980.[2]

C. *The Effect of the Withdrawals*

The plaintiffs contend that the lands in question remained unreserved and unavailable for allotment notwithstanding their withdrawal for use as wildlife refuges. Initially, they argue that Congress acted to segregate lands used and occupied by Alaska Natives from the public domain until such time as they could secure title. In support of this argument, the plaintiffs cite a long string of statutes and treaties, beginning with Article III of the Treaty of Cession, 15 Stat. 12 (1867), and ending with section 4 of the Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339 (1958) (amended 1959). The rights granted by these statutes and treaties, however, have never been held to rise to the

[2]The plaintiffs also argue that the Executive lacks authority to extinguish rights created by Congress. Even if Congress had vested the right to seek allotments in the Alaska Natives, this is not a case in which the President has acted without regard to the will of Congress. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See generally* Quint, *The Separation of Powers Under Carter*, 62 Texas L. Rev. 785, 788-826 (1984) (discussing conflicts in the allocation of policymaking power between the executive and legislative branches in the absence of an express constitutional provision). Instead, we find that the Executive's actions were expressly authorized by the Pickett Act and ratified by ANILCA.

level of enforceable ownership rights. *See Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945); *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877). *See generally* P. Maxfield, M. Dieterich & F. Trelease, *Natural Resources Law on American Indian Lands*, § § 4-3 to -6 (1977). In *Tee-Hit-Ton Indians*, a group of Alaska Natives attempted to assert a compensable property right in the lands they occupied. The Supreme Court rejected their claim:

> We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken.

348 U.S. at 278. Congressional action has now been taken, eliminating the right of Alaska Natives to seek allotments.

The plaintiffs also contend that the withdrawals provide an express exception for their claims. Each withdrawal was made "subject to existing rights." These exceptions, however, only apply to use and occupancy rights. Prior to receiving an allotment, an Alaska Native has no title to any of the lands subject to the Allotment Act. *Cf. Nadeau v. Union Pacific R.R. Co.*, 253 U.S. 442, 445-56 (1920) (interpreting the General Allotment Act, which applies to all Native Americans outside of Alaska). Moreover, none of the plaintiffs had "valid existing rights" in the land at the time that the wildlife refuges were withdrawn. As a result, the withdrawals eliminated their right to seek allotments.

D. *The Clarence Rhode National Wildlife Range*

Public Land Order 2213, which created the Clarence Rhode National

Wildlife Range, [3] provided:

> This order shall not be construed to abrogate or impair any legal or aboriginal claim of right of the natives to use the lands, if any, and they may hunt, fish, and trap in accordance with applicable law, and carry on any other lawful activities.

This statement was added to the formal withdrawal order in response to concerns raised during public comment on the original proposal.

The plaintiffs claim that the language of the order preserved their right to apply for an allotment within that wildlife refuge. First, they contend that the literal wording of the order preserved their "legal right" to apply for an allotment. We disagree. The rights preserved by the order were expressed limited to *use*, rather than ownership. Even though statutes and administrative orders concerning Native Americans are to be given a liberal construction, *see Peter* v. *Kleppe*, 529 F.2d 135, 140 (9th Cir. 1976), we find that the literal language of the order did not embrace the right to apply for an allotment.

Second, the plaintiffs argue that the administrative history of the order shows that it was intended to preserve their right to apply for allotments. A representative of the Department of the Interior told a group of Alaska Natives that it was his understanding that after-arising allotment rights would not be disturbed. He conditioned his remarks, however, by noting:

> We merely stress these points which are a matter of good faith and which the Secretary who is the man who makes the decision (we are just merely gathering the testimony) will take these into consideration. We do not know what he will do with

[3] The Clarence Rhode National Wildlife Range was incorporated into the Yukon Delta National Wildlife Range by section 303(7) of ANILCA.

> them. He may throw this whole thing out; he may accept it as it is; or he may modify it based on points raised by you men here tonight.

While it is true that he submitted a report to the Bureau of Land Management recommending protection of after-arising allotment rights, it appears that his recommendation was ignored. In any event, we must defer to the Department's interpretation of its administrative orders if that interpretation is "not unreasonable [and] the language of the orders bears [that] construction." *Udall v. Tallman*, 380 U.S.1, 18 (1965). We cannot say that the Department's interpretation is unreasonable.

## III

## CONCLUSION

Since 1867, Congress has permitted the use and occupancy of unappropriated real property by Alaska Natives. In the case of the plaintiffs before us, their hope and expectation of attaining title to the lands that they and their ancestors have occupied for generations has been thwarted by administrative withdrawals. The fairness of this administrative action, which has deprived the plaintiffs of any chance to obtain title, should be reviewed by Congress.

The judgment of the district court is AFFIRMED.

*Alaska Native Coalition v. United States*, No. 83-4181
Filed Nov. 23, 1984

FERGUSON, Circuit Judge, concurring:

Under existing law I must concur in the result but I write separately for two reasons. First, because the Alaska Natives are victims of unfortunate technical traps which deprive them of the relief they seek; and second, because I respectfully suggest that Congress should grant the plaintiffs the right to obtain allotments. I therefore set forth in greater detail than the opinion of the Court factual matters which support my suggestion.

This case began when four Alaska Natives filed applications under the Alaska Native Allotment Act (Allotment Act) for allotments of land within the exterior boundaries of three national wildlife refuges in Alaska. Under the provisions of the Allotment Act land was available for allotment only if it was "vacant, unappropriated, and unreserved." 43 U.S.C. § 270-1 (repealed 1971). In each case, the Department of the Interior determined that an executive withdrawal prior to the initiation of the applicant's *personal* use and occupancy of the land deprived the land of its status as vacant, unappropriated and unreserved. Thus, the Department concluded that the land was not available for allotment and denied the applications.

The use of the contested lands by the applicants conforms to a specific pattern. In each instance, use of the land was initiated by an ancestor or other Native predecessor of the applicant. That use was intensive and specific to the land now sought. After the death of the original occupant, the use was continued, without interruption, by that occupant's descendants until the time that the applicant began his or her own independent use. At a time subsequent to the initiation of occupancy by the original occupant, but prior to the beginning of the applicant's independent use, the Department of the Interior, by executive action, withdrew areas of land which include within their exterior boundaries the lands now sought by the applicants. This land has been designated by Congress as the Yukon Delta National Wildlife Refuge (Yukon Delta Refuge), the Arctic National Wildlife Refuge, and the Kodiak National Wildlife Refuge. Pub. L. No. 96-487, §303(2), (5), (7), 94 Stat. 2390-93 (1980).

An example of the use of the land by an applicant is as follows:

Peter Panruk was born in Old Chefornak on June 10, 1949, and began going to his claimed allotment at a young age, in the company of his family. Parcel A of his Native Allotment is located on the north bank of the Kinia River, about six miles west of Chefornak, and consists of 80 acres in what is now the Yukon Delta Refuge. At the age of three or four, he began to hunt for small game, ringtail or ptarmigan, with a bow and arrow. He would also collect eggs. When he was seven, he joined the older men in hunting seal with a rifle. He began to hunt seal by himself in 1959, at the age of ten. Later in the season, he and his family would catch whitefish and flounder and gather berries and wood on the land.

Parcel B, also within the Yukon Delta Refuge, consists of 80 acres located three or four miles from Chefornak and close to the Kinia River. Mr. Panruk and his family did not camp there but went there frequently. He began going by himself to this land in 1959, at age ten. In the summer he picked berries; in the fall he fished and hunted geese and ducks. Mr. Panruk continues to use both parcels each year for subsistence purposes. His family depends upon the food which they gather there.

Each parcel claimed by Mr. Panruk had been used by his parents and grandparents in the customary seasonal manner of Yupik Eskimos since at least 1910. His grandfather is buried on the land called Parcel A. These uses continued unabated from the early 1900's until the time the plaintiff began his independent, potentially exclusive use of the various parcels.

In May of 1948, the United States Fish and Wildlife Service began to express interest in establishing a large wildlife preserve on the Yukon-Kuskokwim Delta, primarily to provide protection for the large numbers of migratory waterfowl which nest in the area. A formal request was filed in the Fairbanks Land Office on January 29, 1955. That application included, within its exterior boundaries, the land being occupied by Peter Panruk's parents and, in fact, being used by a very young Peter Panruk for hunting small game and collecting eggs. Finally, on June 16, 1955, a "Notice of Proposed Withdrawal and Reservation of Lands" was published in the Federal Register. 20 Fed. Reg. 4227-28 (1955).

After publication of the initial notice of proposed withdrawal, two major objections were voiced. First, oil and mining interests protested the proposed closure, under mining and mineral-leasing laws, of an area which they saw as a potential development field meriting considerable exploratory work. Second, the Alaska Natives objected to the withdrawal unless the Natives were explicitly granted the right to continue their customary hunting, fishing, and trapping in the areas to be withdrawn.

Responding to the large number of objections raised after it published the Notice of Proposed Withdrawal, the Department of the Interior exercised its discretion to hold a public hearing on the proposed refuge. The meeting was held in Bethel, Alaska on March 1, 1956 and was presided over by Roger R. Robinson, Alaska Operations Supervisor of the Bureau of Land Management.

At the hearing, the Fish and Wildlife Service representative commented:

> [The withdrawal] is not intended to stop people from doing anything here. It is the intent to guarantee that the natural nesting grounds here will always be here. . . it is not to interfere with hunting and fishing and stuff [that] goes on now. . . .

R. Robinson, Hearings Officer, Hearings Officer Report on Public Hearing March 1, 1956 at Bethel, Alaska Covering Proposed Establishment Kuskokwim National Wildlife Management Area 3 (April 16, 1956). Thus, the government responded to fears of the impairment of the subsistence activities by promising that these would not be affected by creation of a refuge.

In addition to assurances of protection for subsistence usage of the land, the government specifically informed the Natives that legal claims of right under the Allotment Act would be protected. In fact, the specific issue raised in this lawsuit was addressed at the hearing in Bethel as follows:

MR. SCHMIDT: The point I wanted to raise is this, if in the future, at any time — 10 or 15 years from now it should become economically important for any of these people to get ownership to a certain amount of land, what chance would they have to get the land surrounding their villages under this act?

MR. ROBINSON: They have valid existing rights.

MR. SCHMIDT: Then their right would be protected?

MR. ROBINSON: Yes.

MR. NUCKOLES: Could they take up 160 acres out there in the middle of this refuge?

MR. ROBINSON: You mean their allotments?

MR. NUCKOLES: Well, they could file as an Indian, or an Eskimo, or an Aleut here native born. They could file on 160 acres anywhere they wanted to?

MR. ROBINSON: That is the right they have now prior to the withdrawal, so therefore they can exercise it if they wish.

MR. NUCKOLES: Even after the withdrawal?

MR. ROBINSON: They can exercise it any time they want to — that is what we mean by valid existing rights. You see, the Government does not make this retroactive.

QUESTION: Can they withdraw that on ground they are not actually living on. I mean just go out and take any part of it and file on it after the withdrawal or do they have to just have what they are squatting on right now after the withdrawal?

MR. ROBINSON: *That's a point which we will stress in the hearing here. It is my understanding that the Fish and Wildlife Service does not intend to interfere in any way if the natives there would want*

*to move from this point to that point to this point within the Refuge or outside, or back into it. In other words, the present mode of living would be assured. Now, it's true that in point of law at the time the withdrawal order went into effect the place that they are now living would be their valid existing right, however, I have been told by the Fish and Wildlife Service that is not their intent, that if the individual chooses at some later time to take a site over here, that they can do so.* Now we will make that point underlined in the record for review of the Secretary.

MR. GUILSHER: You have mentioned the intent of the Fish and Wildlife Service. What guarantee do we have that the final bill will include all these concessions and promises?

MR. ROBINSON: We merely stress these points which are a matter of good faith and which the Secretary who is the man who makes the decision (we are just merely gathering the testimony) will take these into consideration. We do not know what he will do with them . He may throw this whole thing out; he may accept it as it is; or he may modify it based on points raised by you men here tonight.

Public Hearing of the Kuskokwim Withdrawal Area, March 1, 1956 at Bethel, Alaska 38-9 (R. Robinson, presiding officer, testimony of witnesses A. Schmidt and G. Guilsher) (emphasis in original).

The report Mr. Robinson submitted to the Bureau of Land Management following the hearing emphatically recommended that the withdrawal be made *only* if after-arising allotment rights were protected. Mr. Robinson reported that "the matter of native occupancy rights in the proposed withdrawal. . . [is] a most important facet [of response to the proposal]." R. Robinson, Hearings Officer, Hearings Officer Report on Public Hearing March 1, 1956 at Bethel, Alaska Covering Proposed Establishment Kuskokwim National Wildlife Management Area 7 (April 16, 1956). He voiced particular concern regarding protection of *after-arising* allotments:

> The Eskimos in the general region tend toward a seminomandic life. They move about from place to place as they

> pursue their year-round search for food or income. . . . Now, then, assume a withdrawal from all forms of appropriation is made. It is assumed that "valid existing rights" is implied or will be incorporated in the order. Assume that such a withdrawal was made March 1, 1956.
>
> Now, at some later date one of the Eskimos living in the area wants to acquire title to a piece of land. If he occupied prior to March 1, he could get it; if not, he couldn't. . . . It would seem some definite saving clauses must be included in any order of withdrawal.

*Id.* at 7-8.

Mr. Robinson was requesting language in the final order that would supplement protection given to existing allotments by the "valid existing rights" clause. He recommended that the refuge be created *only* if this suggestion was followed:

> I can recommend withdrawal only if terms of public land order definitely. . . provide for definite avoidance of technical traps in cases where Eskimos may seek patent or allotment of land bona fidely occupied subsequent to PLO date as a result of their semi-nomadic life and, of course, new families.

*Id.* at 10.

It is evident that Alaska Natives are victims of the technical traps of which Mr. Robinson warned. They were caught in these traps solely because they lived, as did their ancestors, a semi-nomadic life necessitated by their search for food. The plaintiffs should not be punished for their traditional life style. Congress should enact law consistent with the good faith expressed by Mr. Robinson, the government representative in the field.

*Akootchook v. United States*, No. 83-4181
Filed Nov. 23, 1984

CHAMBERS, Circuit Judge, concurs in the opinions of Judges FERGUSON and BEEZER.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| GEORGE W. AKOOTCHOOK, EVELYN GORDON, PETER PANRUK, STANLEY MCCORMICK, Plaintiffs, vs. JAMES G. WATT, Secretary of the Interior; UNITED STATES OF AMERICA, Defendants. | ) | Filed and entered, August 5, 1983 *MEMORANDUM AND ORDER* |

F82-004 CIV

THIS CAUSE comes before the court on cross-motions for summary judgment. Jurisdiction exists pursuant to 28 U.S.C § 1353 (1976). Oral argument is denied in order to expedite the business of the court. *See* Local Rule (GR) 5(C)(1).

I. FACTS

The case concerns applications by Native Alaskans for land allotments under the Alaska Native Allotment Act. *See* Act of May 17, 1906, Pub. L. No. 171, 34 Stat. 197 *as amended by* Act of August 2, 1956, Pub. L. No. 931, 70 Stat. 954, *repealed by* (but with a savings clause for applications pending on December 18, 1971) Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1976). Plaintiffs' applications for allotments under the 1906 Act were all denied on the basis that

the applicants failed to make an adequate showing of use and occupancy[1] of the land at issue prior to its withdrawal from availability for selection under the Act. This suit challenges the denial of their applications. A class was certified with the named plaintiffs representing:

> All Alaska Natives who made timely application for allotments under the Alaska Native Allotment Act of May 17, 1906, 34 Stat. 197 *as amended*, 70 Stat. 954 (1956) for lands located within the boundaries of those National Wildlife Refuges, now known as the Arctic National Wildlife Refuge, the Yukon Delta National Wildlife Refuge and the Kodiak National Wildlife Refuge and whose applications have been or will be denied because the land they sought was considered reserved or otherwise unavailable for allotment for reasons related to or arising out of its status as withdrawn land.

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[1]Plaintiffs incorrectly assert the term "use and occupancy rights" and its attendant case law can be given the same meaning and application in different contexts. In a broad, general sense, the term refers to aboriginal rights as recognized by Congress and the courts. In the context of the Alaska Native Allotment Act, however, the term has a meaning relating solely to the procedure by which an allotment may be obtained. *See* Act of August 2, 1956, Pub. L. No. 931, 70 Stat. 954, § 3 (five years of continuous use and occupancy required). Much of plaintiffs' reliance on case law and statutes addressing "use and occupancy rights" is inapposite. Most of these authorities ad dress the concept in a context involving aboriginal rights to use and occupy land or a right to use and occupy land based on a specific act of Congress. Such use and occupancy rights were not affected by the withdrawals at issue in this case, and they continued unimpaired until passage of ANSCA. *See generally* 43 U.S.C. § 1601-1641 (Supp. V 1981). The withdrawals at issue in this case prohibit use and occupancy of land by Alaska Natives only insofar as those rights are related to the procedure set forth by Congress for acquiring an allotment under the Alaska Native Allotment Act.

Plaintiffs raise two arguments in support of their position. They first allege that the land at issue was not validly withdrawn. Second, they contend the 1906 Act, as amended, provides for consideration of ancestral uses of the land in determining whether adequate use and occupancy has been shown under the Act.

## II. THE SUMMARY JUDGMENT MOTIONS

Plaintiffs' motion requests the court to find as a matter of law that: 1) the lands for which plaintiffs have applied were available for allotment under the Alaska Native Allotment Act at the time their applications were filed if they had been used and occupied by Alaska Natives, in a substantially continuous manner, since prior to the date of withdrawal; 2) in the case of the Clarence Rhode Range, the lands were available for allotment at any time until December 18, 1971; and 3) that defendants; rejection of plaintiffs; allotment applications and their continuing refusal to readjudicate said applications were erroneous, in violation of law, and a breach of fiduciary duty. Defendants' cross-motion for summary judgment request the court to rule as a matter of law that the lands at issue, which were withdrawn as wildlife refuges, are not available for allotment by applicants whose individual use and occupancy began after the withdrawal.

There is no genuine issue of fact regarding each plaintiff's individual use of the land sought. Each began his or her personal use of the land after the land was allegedly withdrawn by either public land order or executive order. The court deems it proper to initially decide whether the withdrawals were lawful.

### *A. Validity of the Withdrawals*

#### *1. Authority to Make Withdrawals*

Plaintiffs contend that only Congress, not the President or an executive officer (*e.g.*, Secretary of Interior), had authority to extinguish Native occupancy rights. This argument directly challenges Pickett Act authority insofar as it is used to withdraw lands subject to Alaska Natives' use and occupancy rights acquired in pursuit of an allotment. For the following reasons, the court concludes that both the President

and the Secretary of Interior had authority to extinguish such Native occupancy rights.

There can be no doubt that Congress has the supreme authority in making lands available for allotments to Alaska Natives. It is clear, however, that Congress expressly delegated broad discretionary powers to the President for withdrawing public lands from "settlement, location, sale or entry." Act of June 25,1910 (Pickett Act), Pub. L. No. 303,§1, 36 Stat. 847, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Title VII,§704(a), 90 Stat. 2792. The President, in turn, validly delegated that authority to the Secretary of Interior. *See* Exec. Order No. 9337, 3 C.F.R. 1274 (1938-43 compilation), *repealed by* Exec. Order No. 10355, 3 C.F.R. 873 (1949-53 Compilation), *reprinted in* 43 U.S.C. § 141, at 22 (1976). As a consequence, it is clear that both the President and the Secretary of Interior had authority to withdraw lands pursuant to the Pickett Act.

*2. Meaning of "Public Lands"*

The meaning of the term "Public Lands", as used in the Pickett Act, is an important issue in this case. The Act does not define it. In general, when this term is not specifically defined, it is given the traditional meaning adopted by the Supreme Court. Public lands are lands subject to sale or other disposal under general laws and do not include lands to which any claims or rights of others have attached. *See Bardon v. Northern Pacific Railroad Co.*, 145 U.S. 535, 538, 543 (1892); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F. 2d 585, 602 (9th Cir. 1981). The traditional meaning is not always applied, however, and it is not applicable in the present case. *See generally Kindred v. Union Pacific Railroad Co.*, 225 U.S. 582, 596 (1912). The term must be construed in accordance with the nature and object of the statute at issue. *See Larkin v. Paugh*, 276 U.S. 431, 438 (1928); *United States v. Blendaur*, 128 Fed. 910, 913 (9th Cir. 1904).

While the Pickett Act does not define the term "public lands", it is proper to interpret the term as including land to which Native use and occupancy rights have attached at least insofar as those rights are acquired in pursuit of an allotment. The court notes that section two of

the Act excepts from the force and effect of a withdrawal under section one, "all lands which are, on the date of such withdrawal, embraced in any lawful homestead . . .." The Alaska Native Allotment Act is a homestead law; hence, the exception in section two must apply to the Native allotments at issue in this case. Such lands must be "public lands" for the purpose of section one; otherwise it would make no sense to except them in section two. This logic reflects the rule of statutory construction that a statute should be construed so that no part will be superfluous. *See* 2A Sands, Statutes and Statutory Construction § 46.06 (4th ed. 1973). *See also United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976); *Isakson v. Rickey*, 550 P.2d 359, 364 (Alaska 1976). The foregoing supports the court's conclusion that the term "public lands", as used in the Pickett Act, includes lands to which Native use and occupancy rights have attached insofar as those rights were acquired in furtherance of obtaining a homestead pursuant to the Alaska Native Allotment Act.

Further support for the above conclusion is provided in Interior's interpretation of the term. The law is clear that the construction of a statute by the agency charged with its administration is entitled to substantial deference by a court. *See United States v. Rutherford*, 442 U.S. 544, 553 (1979); *Turner v. Prod*, 707 F.2d 1109, 1115 (9th Cir. 1983). The deference should increase when the interpretation has remained consistent for long periods of time. *See id.* at 1116. The Supreme Court has also specifically intimated that when the Interior Department is administering an act with which it is charged, Interior's interpretation of the term "public lands" should be given deference by the courts. *See Kindred v. Union Pacific Railroad Co.*, 225 U.S. at 596. Interior has taken the position in the past the "public lands", as used in the Pickett Act, may include lands to which use and occupancy rights have attached under a homestead entry. *See generally* Solicitor's Opinion dated February 8, 1935, 55 I.D. 205; *Jack Z. Boyd* (on Reconsideration), 81 I.D. 150 (15 I.B.L.A. 174) (1974).

*3. The Time at Which Withdrawals Took Effect*

In continuing the analysis relating to validity of the withdrawals, the court next focuses on the time at which the withdrawals took effect. The Government's past policy has been to withdraw lands under

Pickett Act authority, even if the lands were already subject to use and occupancy rights based on entry under the Alaska Native Allotment Act. Withdrawals had prospective effect. A previously existing valid entry was not effected by a withdrawal. This was consistent with Congress' explicit protection of the prior entrant's right to perfect his interest in the land. *See* Pickett Act, 36 Stat. 847, 848, § 2. Only future entrants were prohibited from acquiring rights in the land. In essence, the withdrawals only took full effect at the moment rights under the prior valid entry terminated. *See Jack Z. Boyd* (On Reconsideration), 81 I.D. at 152; *Paxton J. Sullivan*, 80 I.D. 810, 811, (14 I.B.L.A. 120) (1973).

Interior's withdrawal policy is not limited to lands in which rights are sought under the Alaska Native Allotment Act. It appears to be a long-standing policy of general application. *See* Solicitor's Opinion dated February 8, 1935, 55 I.D. 205; *Staltz v. White Spirit*, 10 L.D. 144 (1890). Insofar as the withdrawal policy was implemented under authority of the Pickett Act, it is entitled to deference by the court. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965).

*B. Tacking Ancestral Rights*

In the present case, members of the plaintiff class had their allotment applications denied because the required personal use of the land they sought began after such lands were withdrawn. Plaintiffs now make the same argument to this court that they made at the administrative proceedings, *i.e.*, that they met the use requirement in secton three of the Alaska Native Allotment Act by tacking the rights of prior entrymen. The court disagrees with plaintiffs. A recent Ninth Circuit case makes it clear that allotments under the Act must be based on personal occupancy and may not be acquired through tacking ancestral occupancy rights. *See Shields v. United States*, 698 F.2d 987, 989 (9th Cir. (1983). Accordingly, it is proper to grant summary judgment to defendants to the effect that the lands at issue are not available for allotment by applicants whose individual use and occupancy began after Pickett Act withdrawals. It is also proper to deny plaintiffs' motion for summary judgment insofar as they seek a declaration that the lands for which plaintiffs have applied were available for allotment under the Alaska

Native Allotment Act at the time their applications were filed, if the lands had been used and occupied by Alaska Natives in a substantially continuous manner since prior to the date of the withdrawal.

*C. Availability of the Clarence Rhode National Wildlife Range*

Plaintiffs allege the public land orders withdrawing lands at issue in the Clarence Rhode National Wildlife Range allowed continued entry for the purpose of establishing use and occupancy rights under the Alaska Native Allotment Act. The court initially notes that the effective date of withdrawal for these lands was January 19, 1955. *See* Withdrawal Application F-012151; 43 C.F.R. § 295.10(a) (1954). None of the plaintiffs began the requisite five years of continuous use and occupancy prior to the date of withdrawal.

Plaintiffs' argument is based on an interpretation of language in two public land orders issued by the Secretary of Interior. Both P.L.O. 2213 and P.L.O. 4584 provide that the order should not be construed to abrogate or impair any legal or aboriginal claim or right of natives to use the lands, and they may hunt, fish and trap in accordance with applicable law, and carry on any lawful activity. *See* P.L.O. 2213, 25 Fed. Reg. 12,597 (1960); P.L.O. 4584, 34 Fed. Reg. 1143 (1969). The Department of Interior interpreted the pertinent language of these orders as not providing an exception from the withdrawal insofar as entries for allotments are concerned. *See generally Jack Z. Boyd* (On Reconsideration), *supra*. This interpretation is not contrary to the plain meaning of the orders as plaintiffs suggest. Interior could, and apparently did, reasonably interpret the pertinent language in these orders as excluding rights acquired in pursuit of an allotment because such rights are more properly characterized as relating not merely to *use* of land, but ultimately to *acquisition of title*. The court's inference is borne out by the fact that Congress passed numerous statutes protecting Alaska Natives' rights to generally use and occupy land. *See* Act of May 17, 1884, 23 Stat. 24, 26, § 8 (Organic Act); Act of March 3, 1891, 26 Stat. 1095, 1100, § 14 (trade and manufacture site exemptions); Act of June 6, 1900, 31 Stat. 321, 330, § 27 (Civil Government Act); Act of May 1, 1936, Pub. L. No. 538, 49 Stat. 1250, § 2 (Act providing for designation of Indian reservations in Alaska). Since Interior's interpretation of the public land

orders was reasonable, this court must give it deference. *See Udall v. Tallman*, 380 U.S. 1, 16-18, 23 (1965); *Udall v. Oelschlager*, 389 F.2d 974, 976 (9th Cir. 1968). The court therefore concludes that the land at issue within the Clarence Rhode National Wildlife Range was withdrawn from entry under the Alaska Native Allotment Act on January 19, 1955.

*D. Defendants' Rejection of Plaintiffs' Applications*

Plaintiffs contend that defendants' rejection of plaintiffs' allotment applications and their continuing refusal to readjudicate them was erroneous, in violation of law, and a breach of fiduciary duty. Based on the legal conclusions set forth in this memorandum, the court rules as a matter of law that defendants did not err, were not in violation of law, and did not breach a fiduciary duty owed plaintiffs.

Accordingly, IT IS ORDERED:

1) THAT summary judgment is denied plaintiffs as to all relief requested.

2) THAT defendants' cross-motion for summary judgment is granted to the effect that the lands at issue were validly withdrawn as wildlife refuges, and were not available for allotment by applicants whose individual use and occupancy for the purpose of section 3 of the Alaska Native Allotment Act began after an effective withdrawal.

3) THAT the Clerk of Court enter final judgment stating 1) and 2) of this order.

DATED this 2nd day of August, 1983, at Anchorage, Alaska.

*s/James A. Von Der Heydt*
United States District Judge

cc: Craig Tillery
U.S. Attorney

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF ALASKA

| | | |
|---|---|---|
| GEORGE W. AKOOTCHOOK, et al., | ) | Civil Action Docket No. F-82-004 CIV |
| vs. | ) | JUDGMENT |
| UNITED STATES OF AMERICA DEPARTMENT OF INTERIOR, JAMES WATT, Secretary | ) | (Filed Aug. 19, 1983) |

This action came on for consideration before the court, United States District Judge James A. von der Heydt presiding. The issues having been duly considered, and a decision having been duly rendered,

It is Ordered and Adjudged:

1) THAT summary judgment is denied plaintiffs as to all relief requested.

2) THAT defendants' cross-motion for summary judgment is granted to the effect that the lands at issue were validly withdrawn as wildlife refuges, and were not available for allotment by applicants whose individual use and occupancy for the purpose of section 3 of the Alaska Native Allotment Act began after an effective withdrawal.

JAMES A. VON DER HEYDT Date: August 17, 1983

# UNITED STATES DEPARTMENT OF THE INTERIOR
# OFFICE OF HEARINGS AND APPEALS
# INTERIOR BOARD OF LAND APPEALS

## MARY T. AKOOTCHOOK

IBLA 75-86 Decided September 16, 1974

Appeals from Bureau of Land Management decisions, F-16286 etc., rejecting Native allotment applications covering lands within the Arctic National Wildlife Range.

Affirmed as modified.

## OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This is a consolidated appeal from Bureau of Land Management decisions rejecting Alaska Native Allotment applications, listed in the Appendix hereto, because the lands under application are within the Arctic National Wildlife Range. The subject lands were "withdrawn from sale, location, selection and entry under the public land laws" on January 22, 1943, by Public Land Order 82, and were conveyed into the Arctic National Wildlife Range by Public Land Order 2214 of December 8, 1960. Thus the lands involved here have been segregated from entry under the public land laws, and not open to settlement for native allotments, at all times since January 22, 1943.

[1] Each appellant asserted in his application that settlement had been effected on lands within the Wildlife Range after the lands had been withdrawn in 1943, or that settlement had been initiated less than five years prior to that withdrawal. Situations of this type were fully considered in *Christian G. Anderson, et al.*, 16 IBLA 56 (1974), which held that land in the Arctic National Wildlife Range is not available for Alaska Native allotments, where settlement or occupancy was initiated after the land was withdrawn or less than five years prior to such withdrawal. For reasons therein stated the action by the Bureau of Land Management to reject these applications was correct.

Appellants, however, have requested leave of this Board to submit additional evidence to show that use and occupancy was initiated more than five years prior to the initial withdrawal of the lands. We believe that the parties should be permitted to submit further evidence to substantiate their claims.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are modified to allow appellants to submit additional evidence in support of their applications. The evidence must be submitted to the Alaska State Office, Bureau of Land Management, in Anchorage, on or before November 1, 1974, (or within a further reasonable period as may be allowed by the State Director), failing in which the decisions below will be allowed to stand.

*s/Douglas E. Henriques*

Douglas E. Henriques
Administrative Judge

We concur:

*s/Martin Ritvo*

Martin Ritvo
Administrative Judge

*s/Joan B. Thompson*

Joan B. Thompson
Administrative Judge

APPENDIX IBLA 75-86

F 16286 Mary T. Akootchook
F 16291 Betty Brower
F 16296 Ethel Gordon
F 16307 Evelyn M. Gordon
F 16320 Nolan P. Solomon
F 16323 Philip Tikluk
F 16324 Riley Tikluk
F 16623 Daniel Akootchook
F 16632 Tommy O. Gordon
F 16635 Alice A. Killbear
F 16636 Ruby Linn
F 16637 Eunice Marx
F 16646 Frank Oyagak
F 18779 George Akootchook
F 18784 Harold Killbear
F 18795 Isaac Akootchook

# UNITED STATES DEPARTMENT OF THE INTERIOR
# OFFICE OF HEARINGS AND APPEALS
# INTERIOR BOARD OF LAND APPEALS

## STANLEY P. MCCORMICK

IBLA 76-107 Decided January 16, 1976

Appeal from a decision by the Alaska State Office, Bureau of Land Management, rejecting Alaska Native Allotment application AA-7461.

Affirmed.

## OPINION BY ADMINISTRATIVE JUDGE THOMPSON

On May 30, 1975, the Alaska State Office, Bureau of Land Management, rejected application AA 7461, filed pursuant to the Alaska Native Allotment Act, 34 Stat. 197, *as amended*, 43 U.S.C. §§ 270-1 to 270-3 (1970) (subsequently repealed by 43 U.S.C. § 1617 (Supp. III, 1973), subject to pending applications), because applicant failed to establish 5 years of independent control and use of the land prior to withdrawal under Public Land Order 1634, May 10, 1958.

The record on appeal reveals that appellant claims seasonal use and occupancy of lands located within protracted section 25, T. 30 S., R. 30 W., Seward Meridian, from June of 1957 to the present. Appellant was born December 12, 1953, being 4 years old when his alleged use and occupancy of the lands commenced, and 5 years old when the tract was segregated under the Public Land Order. The Bureau notified applicant by letter that he had not completed 5 years of substantial use and occupancy before the May 10, 1958, withdrawal, pointing out that "substantial use and occupancy contemplated by the Native [A]llotment [A]ct must be by the Native as an independent citizen for himself or as head of a family, and not as a minor child occupying or using the land in company with his parents." Applicant was then given 60 days to correct any error in the application. Receiving no response, the Bureau issued the decision of May 30, 1975.

Appellant submits, along with his brief, an affidavit of his mother, Mary Anne Rynone, which establishes that his parents moved to Larsens Bay (appellant's residence) in 1952, living there until 1969. Affiant claims that beginning in 1952, her husband used the subject tract for hunting rabbits and ducks and for digging clams. Specifically, she states that "Stan went out at times as a child with his dad when he was very young." Based on this, appellant argues:

> (a) there is no requirement that appellant demonstrate his status as an independent citizen or as head of a family to establish preference rights under the Native Allotment Act,
>
> (b) that it is permissible to tack ancestral use of a parent to acquire rights under the Act, and
>
> (c) that there is no requirement appellant demonstrate five years use and occupancy prior to the withdrawal in 1958.

Further, appellant specifically demands a hearing to show his ancestral use and possession, to demonstrate his own use, and to demonstrate generally that the BLM's rejection was erroneous.

All these arguments are without merit.

[1] We recognize that an applicant does not have to be 21 or the head of a family at the commencement of occupancy and use. "However, he must be old enough to exert independent use and control of the land and must be occupying the land to the potential exclusion of all others. The criterion of 21 years or head of a family must be satisfied when the application is granted. *Natalie Wassilliey*, 17 IBLA 348 (1974)." *James S. Picnalook, Sr.*, 22 IBLA 191,193 (1975). We cannot accept that a child of 4 could have exerted the necessary independent use and control of the land to the potential exclusion of others. *Louise Luke*, 22 IBLA 388 (1975); *James S. Picnalook, Sr., supra; Susie Ondola*, 17 IBLA 359 (1974); *Helen F. Smith*, 15 IBLA 301 (1974); *Arthur C. Nelson (On Reconsideration)*, 15 IBLA 76 (1974).

Furthermore,

> • • • [t]his Board has repeatedly and consistently held that the substantial use and occupancy, as contemplated by the Native Allotment Act, must be by the Native independently for himself or as the head of a family, and *not as a minor child occupying or using the land in company with his parents or ancestors*. Therefore, appellant may not tack on the alleged ancestral use occurring prior to the commencement of his occupancy • • •. *Emma Moses*, 21 IBLA 264 (1975); *Lula J. Young*, 21 IBLA 207 (1975); *Warner Bergman*, 21 IBLA 173 (1975); *Ann McNoise*, 20 IBLA 169 (1975); *Louis P. Simpson*, 20 IBLA 387 (1975); *Arthur C. Nelson (On Reconsideration)*, 15 IBLA 76 (1974); *Larry W. Dirks, Sr.*, 14 IBLA 401 (1974).

*Herman Haakanson*, 23 IBLA 54, 56 (1975) (emphasis added).

Appellant admits in the brief submitted on appeal, by evidence in the attached affidavit, that as a child he was in the company of his father while using the land. He cannot tack on his father's use to establish his own right under the Act.

[2] Appellant argues that the 5-year use and occupancy requirement is contrary to the language of the Native Allotment Act and applies only in cases concerning national forest lands.

The Native Allotment Act, 43 U.S.C. § 270-1 (1970), authorized the Secretary of the Interior "in his discretion and under such rules as he may prescribe" to issue allotments. The Act originally did not require 5 years and occupancy, but by administrative regulation the 5-year period has been the rule since 1935 and is now set forth at 43 CFR

2561.2. *Elsie Bergman*, 22 IBLA 233 (1975); *Warner Bergman*, 21 IBLA 173 (1975). Moreover, a 1956 amendment of the statute requires 5 years of substantially continuous use and occupancy. 43 U.S.C. § 270-1 to 270-3 (1970).

> • • • [W]e do not agree that the legislative history of the 1956 amendments to the Alaska Native Allotment Act, codified as 43 U.S.C. § § 270-2 to 270-3 (1970), conclusively shows an intent on the part of Congress to limit the 5-year requirement to Natives applying for land within a national forest. Instead, it appears Congress ratified the existing administrative regulations applicable to all Natives. *Heldina Eluska*, 21 IBLA 292, 293-94 (1975)
> • • •

*Elsie Bergman*, *supra* at 234, 235.

It is settled that the requirement applies to land regardless of where it is situated. *Jack Gosuk*, 22 IBLA 392, (1975); *Louis P. Simpson*, 20 IBLA 387 (1975).

[3] Appellant further contends that requiring use and occupancy prior to a withdrawal, as per the Secretarial Guideline of October 18, 1973, violates the rulemaking procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1970). We reject this argument.

The APA, 5 U.S.C. § 553(a)(2)(1970), expressly excepts public property from the rulemaking requirements. "Public lands are public property, and are therefore exempt from rule making procedures. *McNeil v. Seaton*, 281 F.2d 981, 986 (D.C. Cir. 1960); *Heirs of Dorothy Gordon*, 22 IBLA 213 (1975); *Arizona Public Service Co.*, 20 IBLA 120, 122 (1975)." *Herman Joseph (On Reconsideration)*, 22 IBLA 266, 268 (1975). Therefore, the Secretarial Guidline did not need to be published under the rulemaking procedure.

[4] Lastly, this Board has held there is no right to a hearing concerning the rejection of a Native allotment application. *Jack Gosuk*, *supra* at 395; *see Pence v. Morton*, 391 F. Supp. 1021 (1975), *appeal pending*. Such a hearing may be granted in the Department's discretion, but such "[h]earings will not be held where it is unlikely that further evidence will result in a different conclusion." *Beulah Moses*, 21 IBLA 157, 158-59 (1975). There is no indication that such evidence could be produced at a hearing. Also, appellant was afforded adequate opportunity to submit further proof to support his application. Therefore, appellant's request for a hearing is denied.

This Board finds that the decision below was proper, as appellant has failed to satisfy the 5-year use and occupancy requirement in his own right, before the land was withdrawn from Native allotment settlement.

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decision rejecting Native allotment application AA 7461 is affirmed.

*s/Joan B. Thompson*

Joan B. Thompson
Administrative Judge

We concur:

*s/Martin Ritvo*

Martin Ritvo
Administrative Judge

*s/Douglas E. Henriques*

Douglas E. Henriques
Administrative Judge

# UNITED STATES DEPARTMENT OF THE INTERIOR
# OFFICE OF HEARINGS AND APPEALS
# INTERIOR BOARD OF LAND APPEALS

## PETER PANRUK

IBLA 77-278 Decided September 19, 1979

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application F-17820.

Affirmed.

## OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Peter Panruk has appealed from a decision dated March 24, 1977, by the Alaska State Office, Bureau of Land Management (BLM), rejecting his Native allotment application F-17820 (Anch.)

Appellant's allotment application was filed on April 6, 1972.[1] Appellant, who was born on June 10, 1949, claimed seasonal use of the land for hunting, fishing, and trapping from May 1959.

The decision of BLM states that the lands described in the application were "withdrawn"[2] on January 19, 1955 when a wildlife range withdrawal application, F-012151, was noted to the records. Public Land Order No. (PLO) 2213 of December 8, 1960, established the Clarence Rhodes National Wildlife Range and reserved the land as a wildlife refuge. The decision rejected the application for the stated reason that the applicant, who was 5 years old when the land was segregated did

[1]The application was filed pursuant to the Alaska Native Allotment Act, 43 U.S.C. §§ 270-1-270-3 (1970), and the pertinent regulations in 43 CFR Part 2561. The Allotment Act was repealed by section 18 of the Alaska Native Claims Settlement Act of December 18, 1971, 43 U.S.C. § 1617 (1976).

[2]The lands were "segregated" from appropriation under the public land laws by the notation on the Land Office records. The regulations, 43 CFR 295.10 (a) (1954), provided:

"§ 295.10 *Segregative effect of application by Federal or State agency.*

"(a) The recording in the serial register and the noting on the official plats and in the tract books maintained by the land office for the area, or by the Washington Office of the Bureau of Land Management if there is no land office for the area, of information indicating that an application for the withdrawal or reservation of lands has been received from a Federal or State agency shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications, the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. Such temporary segregation shall not affect the administrative jurisdiction over the segregated lands.

not assert 5 years of independent control and use of the land prior to its withdrawal.[3]

---

[3]It is no longer necessary that an applicant for a Native allotment show 5 years substantial use and occupancy *prior* to the closure of land to appropriation under the public land laws. We stated in *Bella Noya*, 42 IBLA 59, 61-2 (1979), as follows:

"The foregoing skirts the legal issue before us which is whether under the Native Allotment Act the appellant has completed substantial use and occupancy as an independent citizen or family head prior to the withdrawal of the land. Although earlier decisions *e.g.*, *Susie Ondola*, 17 IBLA 359 (1974); *Christian G. Anderson*, 16 IBLA 56 (1974), embody the requirement of the Secretarial guidelines of October 18, 1973, that a Native must have initiated and completed substantial use and occupancy of the land for 5 years *prior* to a withdrawal or reservation, Secretarial Order No. 3040 of May 25, 1979, abolishes that 5-year requirement reciting in part:

'Sec. 3 *Policy Decision*. A. I have undertaken a review, with the Solicitor, of the five-year *prior* rule. I have approached the review from the premise that the Alaska Native Allotment Act was an act passed for the benefit of Natives and should, therefore, be liberally construed in favor of Natives. The Act itself does not contain the five- year prior rule as an express requirement. The policy appears to have originated as a result of the exercise of agency discretion. Since it was issued, however, the United States [C]ourt of Appeals for the Ninth Circuit has ruled, in *Pence v. Kleppe*, 529 F. 2d 135 (9th Cir. 1976), that the range of the Department's discretion in dealing with Native allotments is narrower than was previously supposed. Whether or not the five-year prior rule is a proper exercise of the Department's discretion, it is not consistent with my policy, that of liberally construing acts passed for the benefit of Natives.

'B. Accordingly, I hereby rescind the five-year prior rule in favor of a rule which merely requires that the full five years use and occupancy must be completed prior to the granting of the Native allotment application, provided that the applicant has either filed for a Native allotment or commenced use and occupancy prior to a withdrawal of the land.'"

The statement of reasons argues that the applicant's father and ancestors used the land for many years prior to 1955 and that ancestral use may be tacked on to avert the segregation effect of PLO 2213.

[1] The issue of tacking is well settled. An allotment right is personal to one who has fully complied with the law and the regulations. An applicant for a Native allotment may not tack on use and occupancy of the land by his ancestors to establish his right. *Floyd L. Anderson, Sr.*, 41 IBLA 280 (1979); *James S. Picnalook, Sr.*, 22 IBLA 191 (1975); *Emma Moses*, 21 IBLA 264 (1975); *Louis P. Simpson*, 20 IBLA 387 (1975); *Anne McNoise*, 20 IBLA 169 (1975); *Larry W. Dirks*, 14 IBLA 401 (1974). *Cf. United States v. Arenas*, 158 F.2d 730 (9th Cir. 1947), *cert. denied*, 331 U.S. 842 (1947); *Woodbury v. United States*, 170 F. 302 (8th Cir. 1909).

Appellant argues in the alternative that his own use and occupancy are sufficient under the Allotment Act, 43 U.S.C. § 270 (1970).

[2] The land in issue was not open to occupancy after 1955, and therefore appellant could initiate no rights thereto by settlement, use, or occupancy commenced in 1959. In addition, since applicant was only 5 years old in 1955, he was too young, as a matter of law, to have used and occupied the land independently and to the exclusion of others. *Floyd L. Anderson, Sr.*, *supra*, and cases cited. Consequently the application must be rejected.

Appellant next argues that the withdrawal effected by PLO 2213 did not include the lands for which he applied. Appellant points out (as did the decision below) that the withdrawal effected by PLO 2213 protected Native uses of the land.

[3] The text, of the relevant part of PLO 2213 is as follows:

> Subject to valid existing rights, the following-described public lands in Alaska are hereby withdrawn from *all forms of appropriation* under the public land laws,. . . *Provided*, That the reservation made by this order shall not prohibit the hunting or trapping of game animals and game birds or the trapping of fur animals in accordance with the provisions

> of applicable law and as may be permitted by regulations of the Secretary of the Interior prescribed and issued pursuant thereto: . . . .
>
> . . . . . .
>
> . . . . This order shall not be construed to abrogate or impair any legal or aboriginal claim of right of the natives to use the the lands, if any, and they may hunt, fish, and trap in accordance with applicable law, and carry on any other lawful activities. [Emphasis supplied.]

The language of the Public Land Order does not support the argument appellant has made. It clearly withdraws the subject lands from all forms of appropriation — one of which is a Native allotment — while preserving to Natives certain specified uses. These uses are not synonymous with appropriation of the land.

[4] Appellant states that he "can submit evidence" of ancestral use, and that "a hearing has been requested." However, the legal conclusions reached in this decision are based upon undisputed facts. There has been no proffer of further facts which could compel different legal conclusions. It appears, therefore, that no useful purpose would be served by a hearing, and the request therefore is denied. *Floyd Anderson, Sr.*, *supra*, and cases cited.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

s/ *Frederick Fishman*
Frederick Fishman
Administrative Judge

We concur:

s/ *James L. Burski*
James L. Burski
Administrative Judge

s/ *Edward W. Stuebing*
Edward W. Stuebing
Administrative Judge

# TEXT OF ALASKA NATIVE ALLOTMENT ACT
(May 17, 1906)

34 Stat. 197 as amended August 2, 1956, 70 Stat. 954; former 43 U.S.C. §§ 270-1 to 270-3. Repealed but with a savings clause for applications pending on December 18, 1971 by Pub. L. 92-203, 85 Stat. 70, 43 U.S.C. § 1617.

Sec. 1 - The Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed 160 acres of vacant, unappropriated, and unreserved non-mineral land in the district of Alaska or subject to the provisions of the Act of March 8, 1922 (42 Stat. 415, 48 U.S.C. §§ 376 to 377), vacant, unappropriated and unreserved land in Alaska that may be valuable for coal, oil, or gas deposits to any Indian, Aleut or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or who is 21 years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and non-taxable until otherwise provided by Congress provided, that any Indian, Aleut or Eskimo who receives an allotment under this Act, or his heirs, is authorized to convey by deed, with the approval of the Secretary of the Interior, the title to the land so allotted, and such conveyance shall vest in the purchaser a complete title to the land which shall be subject to restrictions against alienation and taxation only if the purchaser is an Indian, Aleut, or Eskimo native of Alaska who the Secretary determines is unable to manage the land without the protection of the United States and the conveyance provides for a continuance of such restrictions. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the non-mineral land occupied by him not exceeding 160 acres.

Sec.2 - Allotment in national forests may be made under this Act if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes.

Sec. 3 - No allotment shall be made to any person under this Act until said person has made proof satisfactory to the Secretary of the Interior of substantially continuous use and occupancy of the land for a period of five years.

# TEXT OF THE PICKETT ACT

## (June 10, 1910)

**36 Stat. 847,** ***repealed by*** 90 Stat. 2743 (1976).

Sec. 1 - That the President may, at any time in his dis cretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States including the District of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

Sec. 2 - That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided,* That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further,* That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided further,* That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to to law: but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under

which the entry or settlement was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

Sec. 3 - That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.